

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 27, 2007 Session

WILLIAM RAINEY v. TENNSCO CORP.

**Direct Appeal from the Circuit Court for Dickson County
No. CV1664 George C. Sexton, Judge**

**No. M2006-02271-WC-R3-WC - Mailed - December 18, 2007
Filed - January 18, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee, William Rainey, reported a gradual injury to his arms in August 2000. He received medical treatment for arm and neck symptoms through workers' compensation and returned to work. Mr. Rainey alleged that he sustained a second injury, to his neck, in May 2002. Tennsco denied that a new injury was reported. Mr. Rainey was examined by two doctors through workers' compensation. Neither doctor considered him to be a surgical candidate. Mr. Rainey sought additional treatment on his own. Eventually, surgery was performed on his cervical spine. At trial, the employer, Tennsco Corporation (Tennsco) denied that Mr. Rainey had sustained a permanent disability as a result of his work injury. The trial court awarded 50% permanent partial disability to the body as a whole. Tennsco has appealed, contending that the evidence preponderates against the award. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Circuit Court Affirmed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J. and ALLEN W. WALLACE, SR. J., joined.

Gordon C. Aulgur and D. Brett Burrow, Nashville, Tennessee, for the appellant, Tennsco Corporation.

Nathan T. Brown, Dickson, Tennessee, for the appellee, William Rainey.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

This case involves several alleged injuries and many doctors. Tennsco is a manufacturer of lockers and cabinets. William Rainey was hired by Tennsco in October 1986 and was employed there until June or July 2002. During his tenure, he worked in several jobs, including press operator, spot welder, tow motor driver and warehouse assembler.

On August 29, 2000, Mr. Rainey reported to his supervisor that he was having pain in both arms as a result of repetitive activities at work. A report of injury was filed. Mr. Rainey was provided with a panel of physicians, and selected Dr. William Jackson, a primary care physician who had previously treated Mr. Rainey. Dr. Jackson prescribed medication and recommended he see a rheumatologist.

When he continued having pain in his shoulders, arms and neck, Tennsco arranged for him to be seen by Dr. Christopher Stark, an orthopaedic surgeon. Dr. Stark treated him with injections and provided braces for him to wear. In December 2000, Dr. Stark referred Mr. Rainey to Dr. Douglas Weikert, an orthopaedic surgeon specializing in the treatment of hand and arm problems. Dr. Weikert prescribed injections and physical therapy. Mr. Rainey was placed on light duty during this period but continued to work. In April 2001, Dr. Weikert released him to full duty. The treatment by Dr. Jackson, Dr. Stark and Dr. Weikert was provided through workers' compensation.

After working one day at full duty, Mr. Rainey was in such pain that he sought additional treatment on his own at Horizon, a local walk-in clinic. He was referred to Dr. Scott Standard, a neurosurgeon. Dr. Standard first saw Mr. Rainey on April 6, 2001. He ordered an MRI that revealed degenerative changes in the cervical spine with a bulging disc but no ruptured disc. Dr. Standard recommended Mr. Rainey have steroid injections and placed him on light duty. He was told by Tennsco that there was no light duty work and was sent home. Dr. Standard also referred Mr. Rainey to a rheumatologist, who diagnosed fibromyalgia. Mr. Rainey was off work from April 2001 until November 2001. At that time, his condition had improved sufficiently to allow him to return to work.

Mr. Rainey worked until the spring of 2002, when he felt his neck "pop" while lifting a locker at work. The date on which this event occurred is disputed. The complaint alleges an injury date of August 29, 2000. Mr. Rainey testified, however, during two discovery depositions that the event occurred on March 31, 2002. Attendance records revealed that he did not work on that date. At trial, he testified that the event occurred on May 24, 2002. He also testified that he advised Laura Tidwell, the plant nurse, of the incident on the day it occurred. Ms. Tidwell testified that she did not recall such an event, and if it had occurred, she would have initiated an accident report.

On May 24, 2002, Mr. Rainey returned to Dr. William Jackson complaining of shoulder, neck and arm pain. Dr. Jackson's medical records do not indicate Mr. Rainey reported experiencing

a “pop” in his neck on that day. Dr. Jackson testified he may not have noted it if Mr. Rainey had so reported since he considered a “pop” to be insignificant in that it is usually ligaments or tendons snapping over a bony prominence. Dr. Jackson ordered an MRI scan, which revealed a disc bulge at C5-6 with a central annular tear. Dr. Jackson testified that “for there to be a true ruptured disc like this with a tear, there has to be some trauma related to it.” Dr. Jackson thought Mr. Rainey needed surgery and referred him to Dr. Harold Smith, a neurosurgeon. Dr. Smith saw Mr. Rainey on two occasions in June 2002, concluded that he had degenerative disc disease with no evidence of stenosis, and did not recommend surgery.

Mr. Rainey made a request to Tennsco to return to Dr. Stark. Dr. Stark examined him on June 21, 2002, reviewed the MRI, and also concluded that surgery was not appropriate. Dr. Stark believed that Mr. Rainey had reached maximum medical improvement, returned him to full duty, and assigned 6% permanent impairment to the body as a whole for the original injury.

When the pain in his neck prevented him from working, Mr. Rainey returned to Dr. Standard. Dr. Standard, who is certified by the American Board of Neurological Surgeons, obtained an MRI, observed the disc bulge at C5-6 had progressed with bilateral foraminal stenosis thus increasing the compression on the nerves going into the arm area. He also observed that a bone spur had formed in that area and concluded that surgery was appropriate. He performed a cervical disc fusion at the C5-6 level on August 5, 2002. Mr. Rainey had a successful initial recovery from the surgery, and Dr. Standard released him to return to work on November 2, 2002. Mr. Rainey returned to Dr. Standard in June 2003. He had been receiving treatment for chronic pain symptoms from a pain clinic in Clarksville, Tennessee. Dr. Standard assigned 25% permanent impairment to the body as a whole at that time. Dr. Standard testified that the surgery and impairment were the result of a combination of the June 1999 injury and an additional work injury which occurred in April 2001.¹

Mr. Rainey was terminated in 2002 during the period of time he was off work. He did not return to work for Tennsco. He worked for six days in November 2005 for Bowker Flooring, sanding and refinishing floors. He testified that he quit that job because of the pain it caused him. Mr. Rainey testified that he was able to lift only ten pounds and could walk no more than 50 feet at one time. On cross-examination, he admitted that he had changed his residence twice since his surgery, and had moved his furniture and effects each time. Tennsco introduced a video recording of Mr. Rainey rotating tires and repairing brakes on a truck and lifting and throwing a large piece of wood. Mr. Rainey admitted that he was the person depicted in the recording.

At the time of the trial, Mr. Rainey was forty-four years of age. He had a twelfth grade education, and had also attended community college and received some technical training related to servicing small engines. He had worked for Tennsco for fifteen years. During that time, he had done “a little bit of everything” in the plant. His previous work experience was as an automotive

¹There is no evidence in the record of injuries occurring in 1999 and 2001. Dr. Standard’s remark may be a misstatement, but it is not explained in the record.

mechanic, a warehouse worker and foreman of a landscaping crew. He had also worked on his father's farm.

The trial court found that an injury occurred in May 2002;² that Tennsco simply treated the matter as a continuation of the previous injury; and that Mr. Rainey had sustained a 50% permanent partial disability to the body as a whole. Tennsco has appealed alleging the trial court erred in making these findings and in awarding Mr. Rainey temporary total disability benefits.³

II. STANDARD OF REVIEW

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997). Where the only dispute between the parties is the conclusion to be reached from the undisputed facts and evidence, the question on appeal is one of law and our review of the trial court's conclusions is *de novo* with no presumption of correctness. See Id.

III. ANALYSIS

a. Compensable Injury

Tennsco contends that the evidence preponderates against the trial court's finding that Mr. Rainey sustained a compensable injury in May 2002. There are two primary bases for this position. First, Tennsco correctly notes that Mr. Rainey changed his testimony concerning the date of injury. The date given by Mr. Rainey in two discovery depositions was March 31, 2002. Attendance records produced during discovery showed that Mr. Rainey did not work on that date. Mr. Rainey then testified at trial that the injury occurred on May 24, 2002. He stated that he realized that the injury actually occurred on that date after he discussed the matter with his attorney. As a result, Tennsco

²The trial court found the injury occurred on May 28, 2002. The proof at trial indicates the date should have been May 24, 2002.

³Tennsco also contends that the trial court erred in finding that Tennsco treated the May 2002 injury as a continuation of the prior injury. This issue is pretermitted by our affirming the trial court's finding of a compensable injury.

contends that Mr. Rainey's trial testimony should be given no weight. In addition, Tennsco argues that the absence of any reference to an incident in either March or May in the medical records from that time further suggests that no such incident occurred. Resolution of this issue must be based, at least initially, upon an assessment of Mr. Rainey's credibility. The trial court did not make an explicit finding on the subject. However, a trial court's findings concerning credibility may be inferred from the manner in which it resolves conflicting testimony and decides the case. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733-34 (Tenn. 2002). It is apparent from the trial court's ruling that it accredited Mr. Rainey's trial testimony concerning the occurrence and date of the injury. Mr. Rainey's testimony is corroborated by the fact that he visited Dr. Jackson on May 24, 2002, the date he testified that the incident occurred.

As to the issue of whether a second incident occurred in May 2002, Dr. Stark assigned permanent impairment based upon the first (2000) injury and did not refer to an aggravation in 2002. Mr. Rainey's testimony, the medical records, and the testimony of Drs. Stark and Standard differ concerning the date or existence of an injurious event in May 2002. However, both doctors found that Mr. Rainey had sustained impairment as a result of an injury at work. Dr. Smith and Dr. Stark did not think that Mr. Rainey was a surgical candidate, but neither testified that his condition was not related to his employment. Dr. Standard testified that there were significant differences in Mr. Rainey's condition between the MRI of Mr. Rainey's cervical spine that he observed in April 2001 and the MRI he obtained in July 2002. There is no contrary medical evidence regarding causation. In light of all of these factors, we conclude that the evidence does not preponderate against the trial court's finding that Mr. Rainey sustained a compensable injury in May 2002.

b. Extent of Permanent Disability

Tennsco contends that the trial court erred in using the 25% impairment assigned by Dr. Standard to assess permanent partial disability. Tennsco argues that the 6% impairment assigned by Dr. Stark should have been used instead. This position is based upon the same contention that Mr. Rainey's trial testimony about a May 2002 injury should be disregarded. On that basis, Tennsco submits that only the original (2000) injury should be considered, and any additional impairment resulting from Dr. Standard's surgery should not be considered in assessing disability. Dr. Standard, however, testified that the condition which required surgery was caused by the initial injury and a subsequent aggravation. In light of that testimony and of our decision to affirm the trial court's finding that a compensable injury occurred in May 2002, Dr. Standard's impairment rating is an appropriate benchmark for determining permanent partial disability.

Tennsco also notes that neither Dr. Standard, Dr. Stark nor Dr. Smith imposed any restrictions upon Mr. Rainey's activities. As a result, Tennsco argues, the injury has minimal effect upon Mr. Rainey's ability to find work. The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court and, as stated above, are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 170 (Tenn. 2002); Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). In assessing the extent of an employee's vocational

disability, the trial “court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.” Tenn. Code Ann. § 50-6-241(b) (2005); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). An employee’s own assessment of his or her physical condition and resulting disability is competent evidence for the court to consider in assessing the extent of vocational disability. Collins v. Howmet Corp. 970 S.W.2d 941, 943 (Tenn. 1998); Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972). It is clear that the trial court accredited, in part, Mr. Rainey’s testimony concerning the limitations caused by his injury. It is appropriate for a trial court to consider such testimony in determining the extent of disability resulting from a compensable injury. See Walker, 986 S.W.2d at 208. The evidence does not preponderate against the trial court’s finding on this issue.

c. Temporary Total Disability

The argument that the trial court erred in awarding temporary total benefits is also based upon the contention that Mr. Rainey failed to prove a compensable injury occurred in May 2002. Tenssco implicitly concedes that the dates for which temporary total disability was ordered were correct if the finding of compensability is affirmed. We have affirmed the trial court on that issue and likewise affirm with regard to this issue.

IV. CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are assessed to Tenssco Corporation and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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AUGUST 27, 2007 SESSION

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**Circuit Court for Dickson County
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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appeals to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Tennsco Corporation and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM